Consumer Federation of America

Marlene H. Dortch
Secretary, Federal Communications Commission
4445 12th Street, SW
Washington, DC 20554

April 24, 2003

Re: Notice of *Ex Parte* presentation in Docket No. 02-277

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter describes a meeting held on March 21, 2003, between Dr. Mark Cooper (Director of Research, Consumer Federation to America or CFA), Robert Brandon (Robert M. Brandon Associates), FCC Commissioner Michael Copps and Jordan Goldstein.

Citing the detailed materials submitted by CFA and CU in Docket 02-277, Cooper and Murray described principles of market structure analysis for media based on economic fundamentals that recognize the unique importance of civic discourse. A summary of the principles is attached. Alternative approaches to describing media market structures in quantitative terms were discussed. The Department of Justice Merger Guidelines were discussed, particularly the threshold of unconcentrated markets as a critical level for civic discourse.

Sincerely,

Mark Cooper

Mark Cooper
Director of Research
Consumer Federation of America

Attachments

PRINCIPLES OF MARKET STRUCTURE ANALYSIS FOR MEDIA BASED ON ECONOMIC FUNDAMENTALS AND THE UNIQUE IMPORTANCE OF CIVIC DISCOURSE

THE OVERALL LOCAL MEDIA MARKET STRUCTURE

The Federal Communications Commission should not tolerate or encourage concentrated media markets.

The standard definition of unconcentrated markets, well grounded in economic theory and practice, is a market with the equivalent of 10 or more, equal-sized producers. Civic discourse demands even more vigilance. The purpose of the antitrust laws is to prevent the acquisition and abuse of market power. The bold aspiration for the First Amendment is broader and more aggressive – the widest possible dissemination of information for diverse and antagonistic sources.

The analysis of news and information, as opposed to entertainment or ad markets, should be the primary basis of market structure analysis.

Many broadcast stations do not provide news whatsoever. Radio has all but abandoned news and cable TV channels never did provide news. As a consequence, news media markets are much more concentrated than broadcast and video TV markets.

Market structure analysis should recognize the function, reach and impact of different media products.

Television and newspapers dominate the news media market. Television provides the announcement function. Newspapers provide in-depth coverage. Other sources of news are dwarfed by the two dominant sources. (According to surveys, radio and Internet account for less than 20% for individuals.) The FCC should focus its analysis on TV and newspapers as the dominant voices in civic discourse, and adjust for the lesser voices.

A diminimus exception for cross-ownership should be allowed to promote civic discourse.

Relatively small newspaper or television outlets (less than 5 percent market share) should be exempted from the above rules. To the extent that larger media outlets seek to obtain cross technology partners, this should be allowed as it can increase the availability of important voices.

Similarly, there has traditionally been a failing firm exception. Under the principle that it is better to keep a media voice that it bankrupt in the market through a merger, than to lose it, failing firms have been allowed to merge, even where such a merger would not otherwise be approved.

SEPARATE PRODUCT SHOULD NOT BE HIGHLY CONCENTRATED OR THE SOURCE OF EXCESSIVE LEVERAGE ACROSS SUB-MARKETS

Individual broadcast product markets should not be allowed to become highly concentrated.

Excessive market concentration in electronic media cannot be compensated for by cross media competition. Each product market should be no worse than moderately concentrated. The FCC should not allow horizontal mergers in properly defined media markets that are highly concentrated, post-merger. That is, if the merger proposed is in a market that is highly concentrated or would result in a market that is highly concentrated it should not be allowed.

TV broadcast products should not be a source of excessive leverage in the overall media market.

The FCC should not allow vertical or conglomerate mergers between major firms (top 4) in which the television markets involve is highly concentrated.

The FCC should have a waiver policy on horizontal mergers in properly defined media markets that are moderately concentrated (post-merger). The FCC should have a waiver policy for vertical and conglomerate mergers in properly defined media markets that are moderately concentrated (post-merger). The merging parties should be required to show that the merger will promote the public interest. The FCC should require the preservation of functionally separate news and editorial departments in the subsidiaries of the merged entity.

These principles are summarized in the following exhibit. They constitute a straightforward adaptation of antitrust principles that are fully defensible within the context of current law and Supreme Court policy on media ownership.

LAYERING THRESHOLDS TO SERVE THE PUBLIC INTEREST AND PROMOTE COMPETITION IN MEDIA MARKETS,

TOTAL MEDIA MARKET MUST BE UNCONCENTRATED, NO MERGERS ALLOWED IF THE POST-MERGER HHI-ADJUSTED VOICE COUNT IS THE EQUIVALENT OF LESS THAN 10 EQUAL-SIZED VOICES

MERGERS INVOLVING HIGHLY CONCENTRATED BROADCAST MARKETS ARE PROHIBITED

CROSS-OWNERSHIP MERGERS INVOLVING MODERATELY CONCENTRATED TV MARKETS ARE CLOSELY SCRUTINIZED

Pre-Merger TV Market Concentration	HORIZONTAL MERGER POLICY (WITHIN BROADCAST MARKETS)	VERTICAL MERGER WITH TV MARKET
High	Banned	Banned
Moderate	Subject to waiver	Subject to waiver
Unconcentrated	Allowed	Allowed

DETAILS OF THE INDEX CAN BE DEVELOPED SEPARATELY FROM THE ADOPTION OF THE OVERALL APPROACH.

The principles of a market structure approach outlined above can be adopted while comment on details of the measurement can be sought. The following presents a generic approach.

[BROADCAST VOICES + NEWSPAPER VOICES] +
[Adjusted for lesser voices: Radio, weekly print, internet] +
Cable adjustment

Television and newspapers are the dominant sources of news and information. Other sources are much less frequently identified.

Market shares must be considered within each product market.

Market structure analysis must start with the audience that each of the media outlets has. Just as market power is grounded in the size of the market an individual firms gains, so too media influence and impact, the ability to speak and be heard, is a function of the audience.

The empirical record does not support the conclusion that the various media products (broadcast video, cable TV, newspaper, radio, Internet) are substitutes. On the contrary, the overwhelming evidence indicates that they are complements. Allowing mergers between them may undermine the ability of each media type to fill the distinct needs that they address. Therefore, the Commission must proceed with great caution if it combines media for purposes of market structure analysis.

Market share data can be readily translated into voice count equivalents.

As a first approximation, we might argue for broadcast HHIs, converted to equal-sized voice equivalents [e.g. an HHI of 2000 converts to the equivalent of 5 equal-sized voice (10,000/2000)]. Newspaper HHIs would be similarly converted to equal-sized voice equivalents (e.g. an HHI of 3333 converts to 3 equal sized voice equivalents).

Broadcast TV and Newspapers are the Dominant Sources of News and Information, but Adjustments for Other Sources Can be Made

Approximately 80 percent of respondents say the get most of their news and information from TV or newspapers. That percentage has been stable since the advent of the Internet. It is even higher for election information.

The number of voices could be inflated to take account of the lesser voices available on radio, the Internet, and other sources. As a first approximation, the Commission could assume the major TV and newspaper voices represent 80 percent of the market (based on the Nielsen study. Radio is the primary source of news for 10 percent of the people, the Internet and other are 10 percent). To continue the previous example, if TV has 5 voice equivalents and newspapers represent 3, the total of 8 would be divided by .8 yield a total of 10 (8/.8=10)]

News markets should be examined.

The Commission should examine the difference between entertainment HHIs and news HHIs. News markets are much more concentrated than entertainment markets because many broadcast TV stations do not provide news. National aggregate data suggests that TV news markets are twice as concentrated as TV entertainment markets. Few cable operators provide news, and even that frequently replicates one of the broadcast networks.

Cable represents, at most, one voice; satellite should not be counted as a voice at present.

The Commission has considered cable TV as a single voice. In the example above, the total would be 10 plus 1 or 11]. To the extent the Commission develops a methodology based on all viewing (as opposed to broadcast shares), a cable adjustment would not be necessary. Moreover, to the extent that there are no independent sources of local news available on a cable system, it should not be counted as an additional voice.

At present, satellite provides no independent local news or information. Indeed, it is struggling to make all local stations available.

Existing cross-ownership and duopoly situations should be taken into account in the final market-wide voice count.

In the above analysis, ownership of multiple outlets must be taken into account. For example, the television HHI would attribute viewers of both stations in a duopoly to the parent firm. Similarly, where a newspaper is cross-owned with a television station, the total voice count would be reduced by 1.

Cross-ownership of radio stations by newspapers and TV broadcasters should also be taken into account by increasing the adjustment factor. In the above example, the adjustment was .8, based on a .1 for radio and a .1 for internet and other. If the radio holdings of broadcasters and newspapers have a market share of 40 percent of the radio market, then the adjustment for radio would be decreased to .6. The voice count would be 9.5 (8/.84=9.52).

The composition of the formula and adjustment can be altered if empirical evidence indicates changes are justified.

The above examples are well supported in the record before the Commission. They are based on data that can be reviewed and updated on a regular basis, as required by the Telecommunications Act of 1996. The biennial review process affords the Commission the opportunity to systematically and routinely examine the assumptions used in constructing the market screens.